SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 136.

THE UNITED STATES, APPELLANT,

vs.

ALBERT C. ENGARD.

APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims.

ALBERT C. ENGARD
v.
THE UNITED STATES. } No. 23133.

I.—*Petition.*

To the honorable the Court of Claims:

The claimant, Albert C. Engard, respectfully represents:

1. He is a chief engineer in the United States Navy on the retired list. On February 11, 1897, and for some time prior thereto, he was a chief engineer in the United States Navy, on the active list, and on sea duty on the United States receiving ship "Richmond" at the navy-yard, League Island, Pennsylvania.

2. On the 11th day of February, 1897, he received the following order from the Acting Secretary of the Navy:

"Report by letter to the president of the steel inspection board, navy-yard, Washington, D. C., for temporary duty in connection with the inspection of steel tubes for the boilers of torpedo boat No. 11, at Findlay, Ohio, and at Shelby, Ohio.

"You are authorized to perform such travel between League Island, Pa., and Findlay, Ohio, and between League Island, Pa., and Shelby, Ohio, as may be necessary in the performance of this duty.

"Keep a memorandum of the travel so performed by you, certifying to its necessity, and submit the same to the Department, from time to time for its approval.

2 "This duty is in addition to your present duties."

3. In pursuance of said order he made the following journeys to inspect steel boiler tubes for said torpedo boat No. 11, traveling between League Island, Pennsylvania, and Shelby, Ohio:

1st journey: He left League Island, Pa., February 24th, when informed by the Shelby Tube Co. that the tubes were ready for inspection. After inspecting all of the tubes that were then ready, he returned to League Island, Pa., April 27th, 1897.

2nd journey: He left League Island, Pa., June 15th when informed by the chief of the Bureau of Steam Engineering that the remainder of the tubes were ready for inspection. He returned to League Island, Pa., August 14th, 1897, after the duty had been completed.

4. He submitted a statement of this travel to the Secretary of the Navy on the 23rd day of August, 1897, and asked the Department to approve such memorandum of travel in order that he might obtain mileage therefor. On the 24th day of August, 1897, his said memorandum was approved by the Navy Department. Thereafter, on August 27th, 1897, he submitted a claim to the Auditor for the Navy Department for mileage for travel performed on said two journeys, the distance travelled amounting to two thousand one hundred and sixty miles (2,160). On the 8th day of September, 1897, the Auditor advised him that said claim had been allowed in the sum of $39.10, but upon further

3 inquiry the claimant was advised by the Auditor as follows:

"In the recent settlement of your claim for mileage you were allowed $172.80, less the difference between other duty pay and sea pay for the time you were traveling and absent from the ship—from February

24th, 1897, to April 26th, 1897; from June 15th, 1897, to August 13th, 1897—or $133.70, leaving a balance due of $39.10."

5. The claimant appealed from said decision of the Auditor to the Comptroller of the Treasury, and said decision was on November 26, 1897, affirmed by the Comptroller.

6. By reason of the facts aforesaid, a claim has arisen to this claimant for the difference between the amount of mileage at eight cents a mile for 2,160 miles travelled, amounting to $172.80, as provided by the act of June 30, 1876 (1 Supp. R. S., 109), less the sum of $39.10 already paid.

No other action than as aforesaid has been had on this claim in Congress or by any of the Departments.

The claimant is the sole owner of this claim and the only person interested therein, and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

4 The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and the claimant believes the facts as stated in this petition to be true, and the claimant claims the sum of one hundred and thirty-three dollars and seventy cents ($133.70).

JOSEPH C. STEBBINS,
Attorney for Claimant.
GEORGE A. & WM. B. KING,
Of Counsel.

STATE OF PENNSYLVANIA,
County of Philadelphia:

Albert C. Engard, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

ALBERT C. ENGARD, U. S. N.

Subscribed and sworn to before me this 30th day of December, 1902.
[SEAL.]
W. ALEX. ROBINSON,
Notary Public.

Commission expires Jan. 13th, 1905.

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II.—*Traverse.*

In the Court of Claims of the United States, December term, A. D. 1902.

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And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

Filed April 30, 1903.

6 III.—*Findings of fact and conclusion of law, with the opinion of the court and the dissenting opinion. Filed May 25, 1903.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

On the 11th day of February, 1897, the claimant was a chief engineer in the United States Navy on the active list, performing duty on the U. S. R. S. "Richmond," at League Island, Pa. On February 11, 1897, the following order was issued to him:

"49154–G NAVY DEPARTMENT,
Washington, February 11, 1897.

"SIR: Report, by letter, to the president of the Steel Inspection Board, navy-yard, Washington, D. C., for temporary duty in connection with the inspection of steel tubes for the boilers of torpedo boat No. 11, at Findlay, Ohio, and at Shelby, Ohio.

"You are authorized to perform such travel between League Island, Pa., and Findlay, Ohio, and between League Island Pa., and Shelby, Ohio, as may be necessary in the performance of this duty.

"Keep a memorandum of the travel so performed by you, certifying to its necessity, and submit the same to the Department, from time to time, for its approval.

"This duty is in addition to your present duties.

"Very respectfully,

"W. MCADOO, *Acting Secretary.*

"Chief Engineer ALBERT C. ENGARD, U. S. Navy,
"*U. S. R. S. Richmond, Navy-Yard, League Island, Pa.*"

II.

In accordance with this order the claimant made two round trips between League Island, Pa., and Shelby, Ohio, to inspect steam boiler tubes for torpedo boat No. 11.

"First journey: I left League Island, Pa., February 24, when informed by the Shelby Tube Company that the tubes were ready
7 for inspection. After inspecting all of the tubes that were ready, I returned to League Island, Pa., April 27, 1897.

"Second journey: I left League Island, Pa., June 15, 1897, when informed by the chief of the Bureau of Steam Engineering that the remainder of the tubes were ready for inspection. I returned to League Island, Pa., August 14, 1897, after the duty had been completed."

The total number of days of absence from claimant's vessel—one hundred and twenty-two.

III.

The claimant made application for mileage upon this trip amounting to $172.80 and was allowed this amount as mileage by the Auditor for

the Navy Department. From this sum there was deducted the difference between sea pay and shore pay at the rate of $400 a year for one hundred and twenty-two days absent from his vessel, alleged to be on shore duty, amounting to $133.70, and the balance as mileage ($39.10) was paid him.

IV.

The claimant has never recovered the balance of mileage claimed.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment in the sum of one hundred and thirty-three dollars and seventy cents ($133.70).

NOTT, Ch. J., delivered the opinion of the court:

The statute relating to sea pay (Rev. Stat., 1571) is sweeping in its terms, but in neither departmental nor judicial construction has it been taken literally.

A ship at anchor is not a ship at sea; a ship sailing up a river is not a ship at sea; a ship in service on inland waters is not a ship at sea; a ship hauled up on a dry dock in a foreign port is not a ship at sea; a ship fighting her way up the Mississippi in 1862 was not a ship at sea; yet in all of these cases it has been held by the accounting officers or the courts that officers serving on such vessels were entitled to sea pay—that a ship at sea means nothing more than a ship afloat, she being at the same time so commissioned, authorized, and organized as to be able to render some kind or other of marine service.

As with the vessels, so with the officers, the statute has never been applied literally. The plain purpose of Congress is that the Government shall pay more where the officer renders more. Service on shipboard involves the breaking up of arrangements for living on shore; separation from family and friends; increased expenses and expenditures; increased hardships and duties; and many personal restrictions. The invariable questions which have been asked in doubtful cases have been, "Was the officer deprived of the ease and comfort and economies of shore duty?" "Did the service to which he was assigned require the sacrifice and discomforts and expenses of a life at sea?" If it did, he was entitled, within the legislative intent, to be considered on duty in a ship at sea; if it did not, he was entitled to no more than the pay of an officer on shore duty.

8 It is also as well settled as the Navy Regulations and the action of the accounting officers and the decisions of the court can make it that the sea pay of an officer does not stop every time he sets his foot upon the shore (Collins's case, 37 C. Cls. R., 222). There is a difference between "shore duty" and duty on shore. It would be a monstrous perversion of the legislative purpose to say that the officers of a naval force landed to assault an enemy's land batteries, or to protect a town, or to guard a consulate, or to bring off wood or water or provisions are in return for extra and hazardous service to be cut down in their pay.

The regulations of a department can not make the law or change it, but the head of a department, by general regulations, can interpret the law for the benefit of his subordinates and give to it practical application. Accordingly, the Navy Regulations provide for the benefit of naval paymasters.

"An officer temporarily absent from a ship in commission, to which he is attached, shall continue to receive sea pay."

This states clearly a general principle. The difficulty in such case probably will be to determine what is temporary absence and what is an assignment to shore duty.

In the present case the Secretary of the Navy has relieved the court from the duty of determining that question by the express terms of his order, which characterizes this officer's added duty of inspecting steel tubes for boilers and his consequent absence from shipboard, as "temporary," and expressly refuses to relieve him from the duties and consequent responsibilities of his sea service. It is manifest that the chief engineer of a great ship of war like the "Richmond" has many duties and responsibilities besides appearing on the deck in uniform—such as making reports, ordering supplies, carrying on correspondence, preparing against accidents to his machinery, supervising the work and discipline and accounts of his subordinates. The "Richmond" continued to lie at the League Island Navy-Yard while the chief engineer went to Shelby, Ohio, to inspect boiler tubes; but he, and no other officer, continued to be her chief engineer as completely as if he walked her deck and slept in her cabin. His service in inspecting boiler tubes was, per se, shore duty; but his service on the "Richmond" at the same time was sea service, and the one was "temporary" and the other permanent.

In Symonds's case (21 C. Cls. R., 148) it was held that the Secretary of the Navy could not deprive an officer of his lawful pay by designating as shore duty that which was in fact sea service. Still less does it seem possible that a Secretary can attach an officer to a vessel at sea and compel him to discharge the duties of an important position, and burden him with its responsibilities, and then deprive him of his lawful pay by compelling him to perform additional duties on land. No person would say that this officer was not entitled to sea pay because he was doing work on land and that he was not entitled to shore-duty pay because he was attached to and doing duty upon a vessel at sea. Yet that would be the logical result of reasoning based upon a literal reading of the statute.

It is true that in this case the officer's absence while inspecting boiler tubes can be accurately ascertained, and in that particular the case differs from those of McGowan (36 C. Cls. R., 63) and Taussig (38 I., —); but the court can not assume, in the face of the Secretary's order, that the officer was doing nothing else and had nothing else to do.

9 It must be held that when the Secretary of the Navy characterizes a special service which he requires a naval officer to perform and the officer's consequent absence as "temporary," the officer is entitled to the benefit of the characterization; and that when an officer duly attached to a ship at sea and entitled to sea pay has additional shore duty placed upon him by an order of the Secretary of the Navy, which in

express terms declares that the shore duty is "in addition" to the officer's duties on his ship, the officer is not thereby deprived of his sea pay. A different conclusion would not only work the injustice of lessening the pay by increasing the duties, but would hamper and embarrass the Secretary of the Navy in the administration of his office.

The judgment of the court is that the claimant recover $133.70.

WRIGHT, J., dissenting:

I do not concur in the conclusion of the majority of the court, nor in the reasoning contained in the opinion. The language of section 1571, Revised Statutes, is plain and positive, that "No service shall be regarded as sea service except such as shall be performed at sea, under the orders of a Department, or in vessels employed by authority of law." The services for which the claimant seeks a recovery in this case were not performed at sea, nor in any vessel, but were performed at places far inland.

It is immaterial that the order giving shore duty designated the same as temporary and in addition to sea duty, for such services were inconsistent; the one could not be performed while in discharge of the other. Besides, the officer assigning to shore duty was not empowered to supersede the authority of the statute, and if by his order he assumed to do so, his act was a nullity and without force or effect. If the reasoning of the opinion of the majority of the court can be given effect to avoid the sanction of the statute in the present case, it is not an impossibility to evade its provisions in every case where it may be desirable to put an officer on shore duty with sea pay; and thus the will of Congress may be wholly frustrated, and the authority of its enactments frittered away.

10 IV.—*Judgment of the court.*

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At a Court of Claims held in the city of Washington on the 25th day of May, A. D. 1903, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the claimant, Albert C. Engard, do have and recover of and from the United States the sum of one hundred and thirty-three dollars and seventy cents ($133\frac{70}{100}$).

BY THE COURT.

11 V.—*Application for and allowance of appeal.*

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From the judgment rendered in the above-entitled cause on the 25th day of May, 1903, in favor of the claimant, the defendants, by their

Attorney-General, on the 4th day of August, 1903, make application for and give notice of an appeal to the Supreme Court of the United States.

L. A. PRADT,
Assistant Attorney-General.

Filed August 4, 1903.

OCTOBER 26, 1903.

Allowed as prayed for.

BY THE COURT.

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I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact, and conclusion of law, of the opinion of the court and the dissenting opinion, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 28th day of October, A. D. 1903.

[SEAL.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsement on cover:) File No. 19102, Court of Claims. Term No. 136. The United States, appellant, vs. Albert C. Engard. Filed October 31st, 1903. File No. 19102.

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